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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 139.

THE DETROIT, FORT WAYNE AND BELLE ISLE RAILWAY, PLAINTIFF IN ERROR,

vs.

CHASE S. OSBORN, COMMISSIONER OF RAILROADS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED JULY 26, 1901.

(18,232.)

16297

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 26, 1902.

1 Supreme Court.

THE DETROIT, FORT WAYNE & BELLE ISLE RAILWAY
vs.
CHASE S. OSBORN, Commissioner of Railroads.

RECORD.

Petition.

To the honorable the justices of the supreme court of the State of Michigan:

The petition of the Detroit, Fort Wayne & Belle Isle railway, a corporation, organized and existing under and by virtue of the laws of the State of Michigan, respectfully shows:

1. That your petitioner is a street railway corporation, organized as such under and by virtue of the provisions of chapter 95, Howell's Annotated Statutes of Michigan, providing for the incorporation of street railway companies, and is now, and has been since its incorporation, engaged in maintaining and operating an electric street railway system in and through the city of Detroit, as hereinafter more particularly set forth.

2. That the Fort Street & Elmwood Avenue railway was a corporation organized under and by virtue of chapter 94, of Howell's Annotated Statutes of Michigan, in February, 1865, for the purpose of constructing and operating a street railway through the streets in the city of Detroit. That said act of the legislature under which said Fort Street & Elmwood Avenue railway was organized, was subject to amendment, and was subsequently amended by an act of the legislature; which said amendment now constitutes section 3527 of Howell's Annotated Statutes. That by virtue of an ordinance duly passed by the common council of the city of Detroit, January 31st, 1865, Frederic Buhl, John P. Clark and Eber B. Ward, their associates, successors and assigns, were given consent, permission and authority to lay a single or double track railway, with
2 all the necessary and convenient tracks for turnouts, side tracks and switches along, and upon certain of the streets of the city of Detroit, commencing at the westerly limits of the city of Detroit, as then existing, where Fort street intersected said westerly limits—thence easterly through Fort street to Woodward avenue, and upon certain other streets in said city. Said grant, and the powers, rights and privileges conferred thereunder, were to extend and continue for a period of thirty years from the date of the passage of said ordinance. That thereafter all the rights, powers and privileges granted by said ordinance to said Frederick Buhl, John P. Clark and Eber B. Ward aforesaid, were transferred to the Fort Street & Elmwood Avenue railway, a corporation organized as aforesaid. That by special act of the legislature of the State of Michigan, passed in 1871, the title of the said railway company was changed

from the "Fort Street & Elmwood Avenue railway" to the "Fort Wayne & Elmwood Railway Company." That by an ordinance duly enacted by the common council of the city of Detroit, and approved June 30th, 1880, all the powers and privileges conferred upon the said railway company by the ordinance of January 31st, 1865, before mentioned, and the amendments thereto, were extended and limited to a further period of thirty years.

3. Your petitioner shows that by a resolution of the township board of the township of Springwells, Wayne county, Michigan, passed on the 17th day of June, 1880, consent, permission and authority *was* given to the Fort Wayne & Elmwood Railway Company, its successors and assigns, to lay a single or double track for a street railway, and all necessary and convenient tracks for turnouts, side tracks and switches in and along the following streets and highways in said township, to wit: Commencing at the then westerly terminus of the city of Detroit, westerly, through Fort street to the west line of Clark avenue, where it intersects Fort street; thence through Clark avenue to the River road; thence through said River road to a point opposite Fort Wayne, for a period of thirty years from the date of said resolution.

4. That on July 1st, 1892, the said Fort Wayne & Elmwood Railway Company sold and transferred all its rights, franchises and property, including the rights and franchises above mentioned to the Fort Wayne & Belle Isle Railway Company, a corporation also organized under chapter 95, Howell's Annotated Statutes of Michigan.

3 5. That your petitioner has acquired, by purchase, all of the contract rights, franchises and grants, belonging to the said Fort Wayne & Belle Isle Railway Company herein recited and set forth, and all the lines of street railway, constructed, maintained and operated thereunder; that said lines are now being operated under and by virtue of the terms of said contracts, ordinances, grants and franchises. That your petitioner is possessed of, and has the right to the enjoyment of all of the rights and privileges created and granted by the said various contracts, ordinances, resolutions and grants.

That under the authority and permission as aforesaid, given by the said city of Detroit, and township of Springwells, said Fort Street & Elmwood Avenue railway, the Fort Wayne & Elmwood Railway Company, the Fort Wayne & Belle Isle Railway Company, and your petitioner have constructed and maintained continuously a double-track railway upon and along said Fort street, from said Woodward avenue westerly to the intersection of Clark avenue, and thence through Clark avenue to the river road and beyond. That under, and by virtue of the said contracts, franchises and grants aforesaid, your petitioner is entitled to maintain and operate its said line of street railway upon said streets, in the city of Detroit, and particularly upon said Clark avenue, and said streets are now being occupied so far as necessary, for that purpose. That your petitioner is entitled to be protected in the full enjoyment of its contract rights, and particularly in the enjoyment of those rights above set forth.

6. That under and by virtue of the resolution of the township board, of the township of Springwells, above referred to, the said Fort Wayne & Elmwood Railway Company obtained full and complete permission and authority to construct a double-track street railway upon Clark avenue, from the intersectien of Fort street to the River road, and that under such authority said Fort Wayne & Elmwood railway proceeded to and did construct a double-track street railway upon said Clark avenue between the points named.

8. That after the construction of the said track upon Clark avenue, between Fort street and the River road by the said Fort Wayne & Elmwood Railway Company, certain steam railroad tracks were constructed across said Clark avenue, between said Fort street and the River road, and at right angles with said Clark avenue—making a crossing at right angles also with the tracks of your petitioner. Your petitioner shows that there are at the present
4 time, three railroad tracks crossing the street railway tracks of your petitioner, upon said Clark avenue; that at the time the track of the said Fort Wayne & Elmwood Railway Company was first constructed upon said Clark avenue, at this point, there was no railroad crossing Clark avenue, and that said railroad tracks, and each and all of them have been built and constructed across said Clark avenue since the laying of the track of your petitioner thereupon. Your petitioner shows that the said railroad tracks are under the control or ownership of the so-called Union Terminal Association, of the city of Detroit, Wayne county, Michigan, and that said railroad tracks are used by said association for the running of locomotives and cars thereupon.

9. Your petitioner respectfully shows that it has been served with a certified copy of an order made by Chase S. Osborn, commissioner of railroads, of the State of Michigan, a copy of which order and certificate is hereto attached, and made a part of this petition, and marked Exhibit "A;" that by said order, the said Chase S. Osborn, railroad commissioner, aforesaid, recites that after a personal inspection of the crossing of the said railroad tracks, at Clark avenue, he has decided that the public interest requires additional protection to be provided thereat, and under authority claimed by him, said commissioner of railroads has ordered that within sixty days from the date of said order, to wit: the 7th day of March, A. D. 1900, the said Union Terminal Association Railway Company cause to be constructed, and thereafter operated and maintained, safety gates, and derailing and signaling appliances to be operated day and night by a watchman from a tower; said tower to be constructed at the best point of vision at the said crossing, and so constructed that the said operator may have plain view of all trains or cars on both of the respective lines; that derailers shall be provided, and placed in the tracks of the Fort Wayne & Belle Isle railway, not less than 75 feet from clearance point or crossing, and that signals shall be placed on the tracks of the Union Terminal Association, at a distance of not less than 600 feet from said crossing; said derailers and signals to be operated by levers in said tower, and such levers to be properly interlocked. Your petitioner further shows that in said

order it is provided that the cost and expense of the construction, maintenance and operation of the said gates, tower and derailing and signaling appliances shall be borne by the Union Terminal Association and the Fort Wayne & Belle Isle Railway Company, equally, share and share alike, and that the appliances aforesaid are to be constructed in accordance with the plans to be submitted to and approved by the commissioner of railroads within thirty days from the date of this order, that is to say, March 7th, 1900. And it is further provided that this order shall be subject to modification at any time, when in the opinion of the commissioner of railroads, the public safety will be more effectually secured.

10. Your petitioner further shows that the compliance with this order will involve the expenditure of a large sum of money; first, in the construction of the said safety devices, and after the same are constructed, in the maintenance and repair thereof.

Your petitioner presumes that said railroad commissioner claims authority to make the order aforesaid under act No. 171, laws of 1893. Your petitioner says, however, that said act was passed long after the organization of said Fort Street & Elmwood Avenue railway, and long after said railway was built in said Clark avenue. That the railroad commissioner has no authority, and could be given no authority, to make the said order, *as* any such order applicable to your petitioner, or to any street railroad organized and constructed prior to the enactment of said statute, or any statute on the subject. That the authority of the said railroad commissioner to make such an order does not extend to your petitioner, nor to the Fort Wayne & Belle Isle Railway Company, and if any such authority has been attempted to be given to said commissioner by the legislature of the State, that the same is void, and any attempt to confer such authority is beyond the power of the legislature, unconstitutional and void, and is an attempt to deprive your petitioner, and other street railroads, organized and constructed, prior to the passage of such act, of its property without compensation, and without due process of law.

Your petitioner shows that before said steam railroad tracks were built across said Clark avenue there was no crossing of any kind, railroad or otherwise, between Fort street and the River road. That said crossing was made for the purely private reasons and convenience of the steam railroads constructing same.

That petitioner's street railway system on said Clark avenue is not an embarrassment to said street, but serves to relieve said street from congestion; is only an improved method of using said street, and an adaptation of the same for more convenient travel and accommodation of the public. That your petitioner and said Fort Wayne & Belle Isle Railway Company should not be made to bear the expense of protecting the public street in question from the danger occasioned by the steam railroads referred to; and that said commissioner of railroads has no more authority to make such order than to compel any other traveler upon said street, nor the township or city authorities to bear said expense.

6 That the necessity, if any there be, for the safety appliances, mentioned in said order, and for the construction and maintenance of the same, including the stationing of a watchman at the crossing mentioned, is not due to the presence of your petitioner's tracks, and the operation of your petitioner's street railway upon said Clark avenue, but on the contrary, is due wholly to the construction of the said lines of steam railroad across said Clark avenue at the point mentioned. That said Clark avenue was an existing highway or public street, and for many years had been used as such at the time said steam-railroad tracks were built across said Clark avenue. That permission for the use of said street for street-railway purposes had been obtained, and the street railway now belonging to petitioner had been constructed, and had been in operation for many years prior to the construction of said lines of steam railroad across said street, and was so in operation at the time of the construction thereof, and has been continuously since then to the present time. That the safety devices mentioned in said order are not designed to protect the public, using said highway from the danger of injury from the operation of your petitioner's street railway on said street; and that said appliances will not serve that purpose; but that on the contrary they are designed to protect the public traveling upon said highway from injuries which might otherwise result from the operation of locomotives and cars upon the said lines of steam railroad crossing Clark avenue.

Your petitioner further shows that after the track now belonging to it was laid in said street, and before the said steam-railroad tracks were constructed across said Clark avenue, there was, and could be no necessity for the order aforesaid, nor for any appliances such as therein described, as there was no highway or other crossing at that point. That the said order was made to protect the public using said Clark avenue from accident due to the crossing of said tracks of said Union Terminal Association, and the operation of the same with engines and cars.

Your petitioner shows that safety devices are not made necessary by reason of the operation of its street railway system in said Clark avenue; that your petitioner has a good and lawful right to be upon said street, and to use the same for the purpose of operating its system; and is entitled to the benefit of the same protection from the increased danger resulting from the crossing of said steam railroad as any other member of the public traveling upon said street and highway, and should not be called upon to incur the expense of rendering said street or highway safe, or protect the same from a danger which is not caused by your petitioner or due to its presence in or use of the street.

7 11. It is further shown unto this court that if this order of the railroad commissioner is valid, and must be obeyed, the obligations imposed by it, and the expense of compliance therewith, must be borne by your petitioner, as the successor of said Fort Wayne & Belle Isle Railway Company, to which said order is addressed.

12. Your petitioner represents that it is advised that the said

order of the railroad commissioner is wholly without authority of law, and is void, and without force; and charges that unless it is so declared by this court your petitioner will be subject to a penalty of ten dollars ($10.00) a day, until said order is complied with. That the enforcement of this order is unjust and oppressive, and that unless its enforcement is prevented by this court, your petitioner will be deprived of its property, franchises and rights, without compensation, and without due process of law, and in contravention of section 10, article 1, of the Constitution of the United States, and of a like provision of the constitution of the State of Michigan.

Your petitioner shows that it is without remedy, save in the present application, and prays that your honors cause a writ of mandamus in due form, to be at once issued from this court, commanding and requiring the Honorable Chase S. Osborn, railroad commissioner of the State of Michigan, to vacate the order aforesaid, so far as the same requires, commands or directs the Fort Wayne & Belle Isle Railway Company, or your petitioner to share or bear any of the expense of constructing and maintaining the safety contrivances or appliances mentioned in said order.

DETROIT, FORT WAYNE AND
BELLE ISLE RAILWAY.
A. B. DU PONT, *Gen. Mgr.*

BRENNAN, DONNELLY & VAN DE MARK,
Attorneys for Petitioner.

8 STATE OF MICHIGAN, } ss:
County of Wayne, }

Antoine B. du Pont, being duly sworn, deposes and says that he is the general manager of The Detroit, Fort Wayne & Belle Isle railway, the foregoing petitioner; that he has read the foregoing petition, and is familiar with the matters therein set forth, and that the facts therein contained are true.

A. B. DU PONT.

Subscribed and sworn to before me this second day of April, A. D. 1900.

(S'g'd) HENRY L. LYSTER,
Notary Public, Wayne County, Michigan.

STATE OF MICHIGAN, } ss:
County of Wayne, }

I, Chase S. Osborn, commissioner of railroads of the State of Michigan, do hereby certify, that I have compared the annexed copy of an order for the construction of safety gates and a derailing and signalling appliance at the Clark Avenue crossing of the tracks of the Union Terminal Association in the city of Detroit, with the original order recorded in Book "D," at pages 396 and 397, and that it is a true and correct transcript therefrom, and of the whole of such original.

Commissioner's Seal.

In testimony whereof, I have hereunto set my hand and affixed the seal of the department at Lansing, this seventh day of February, in the year of our Lord one thousand nine hundred.

(S'g'd) CHASE S. OSBORN,
Commissioner of Railroads.

9 STATE OF MICHIGAN,
Office of the Commissioner of Railroads.

In Re Application of THE COMMON COUNCIL OF THE CITY OF DETROIT for Additional Protection at the Clark Avenue Crossing of the Tracks of the Union Terminal Association in the City of Detroit, County of Wayne, Michigan.

Application having been received by the commissioner of railroads from the common council of the city of Detroit, Wayne county, Michigan, for additional protection at the Clark Avenue crossing of the tracks of the Union Terminal Association in said city of Detroit, Wayne county, Michigan.

And after a personal inspection of the premises aforesaid, and after hearing representations of the city officials of the city of Detroit, as well as the arguments of the representatives of the said railroad company above named in relation thereto, and having decided after due deliberation that the public interests required said additional protection at the said crossing:

Now, therefore, by authority vested in me by law, it is hereby ordered:

That within sixty days from date hereof, you, the said Union Terminal Association Railway Company, cause to be constructed and thereafter operated and maintained, safety gates, and derailing and signalling appliances to be operated day and night by a watchman from a tower. Said tower to be constructed at the best point of vision at the said crossing, and so constructed that the said operator may have plain view of movements of all trains or cars on both of the respective lines. Derailers shall be provided and placed in the tracks of the Fort Wayne & Belle Isle railway, not less than 75 feet from clearance point of crossing, and signals shall be placed on the tracks of the Union Terminal Association at a distance of not less than 600 feet from said crossing. Said derailers and signals to be operated by levers in said tower, and such levers to be properly interlocked.

And it is further ordered that cost and expense of the construction, maintenance and operation of the said gates, tower and derailing and signalling appliance, shall be borne by the Union Terminal Association and the Fort Wayne & Belle Isle Railway Company, equally, share and share alike. This appliance to be constructed in accordance with plans to be submitted to and approved by the commissioner of railroads within 30 days from date hereof, and such appliance to be further approved by the commissioner of railroads before being put into use. This order is subject to modification at

any time when in the opinion of the commissioner of railroads the public safety will be more effectually secured.

Commissioner's Seal.

In testimony whereof, witness my hand and official seal of this department at the capitol in the city of Lansing, this 7th day of March, A. D. 1900.

(Signed) CHASE S. OSBORN,
Commissioner of Railroads.

(Endorsed:) Filed April 4, 1900. Chas. C. Hopkins, clerk.

10 *Order to Show Cause.*

At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the eleventh day of April, in the year of our Lord one thousand nine hundred.

Present: The Honorable Robert M. Montgomery, chief justice; Frank A. Hooker, Joseph B. Moore, Charles D. Long, Claudius B. Grant, associate justices.

THE DETROIT, FORT WAYNE AND BELLE ISLE RAILWAY, Relator,
vs.
CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan, Respondent. } 18125.

On reading and filing the petition and accompanying affidavits of the relator, above named, and on motion of Brennan, Donnelly & Van de Mark, attorneys for relator: Ordered, that said respondent, said commissioner of railroads, do show cause to this court on the first day of May next, why a perem-tory mandamus should not be issued out of and under the seal of this court, to compel him, the said Chase S. Osborn, commissioner of railroads, as aforesaid, to vacate the order by him made and entered on the 7th day of March, 1900, directed to the Union Terminal Association and the Fort Wayne & Belle Isle Railway Company (set out in the petition filed heretofore by relator), so far as the same requires, commands or directs the Fort Wayne & Belle Isle Railway Company or your relator to share or bear any of the expense of construction and maintaining the safety contrivances or appliances mentioned in said order.

11 *Answer.*

STATE OF MICHIGAN:

Supreme Court.

THE DETROIT, FORT WAYNE & BELLE ISLE RAILWAY, Relator,
vs.
CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan, Respondent.

The answer of Chase S. Osborn, commissioner of railroads, respondent, in response to the order to show cause entered in the above-entitled cause, on the eleventh day of April, A. D. 1900, to the petition filed therein, respectfully represents and shows:

1. That as to the facts stated in paragraphs one, two, three, four, five, six, eight, and eleven, he has no direct information, but believes, and for the purpose of framing an issue in this case, admits the same to be true as therein stated.

2. That he admits the facts stated in paragraph nine to be true as therein stated.

3. That he denies the facts and conclusions stated in paragraph ten of said petition, except that he admits, as therein stated, that compliance by petitioner, with the order mentioned in said petition, will involve the expenditure of a large sum of money in the construction of the safety devices therein required, and in the maintenance and repair thereof; that this respondent claims authority to, and did, make said order, made on the seventh day of March, A. D. 1900, as stated in said petition, under and by virtue of the provisions of act 171, Public Acts 1893; that the said act was passed long after the organization of the said Fort Street & Elmwood Avenue railway, and long after said railway was built on Clark avenue in the city of Detroit, and that prior to the building of the tracks of the steam railroad mentioned in said petition, across said Clark avenue, there was no crossing of any kind, railroad or otherwise, between Fort street and the River road.

4. That he denies the facts and conclusions stated in paragraph twelve of said petition, with the exception that he admits that if the said order be declared by this court to be valid, petitioner will be subject to a penalty of ten dollars per day until said order is complied with.

12 5. Respondent further answering shows, that the rights privileges, property and franchises of the said petitioner are subject in all things to such reasonable and valid police regulations as are necessary to the common good, and the general welfare of the public; that said act 171, Public Acts 1893, is a legal and valid police regulation, and that section 5 of said act, which provides as follows: "The commissioner of railroads shall, as soon as possible after the passage of this act, examine the crossings of the tracks of railroads and street railroads then existing, and order such changes made in the manner of such crossings, or such safeguards for protection

against accidents to be provided thereat, as in his judgment ought to be so made or provided; and shall apportion any expense incident thereto between the companies affected as he may deem just and reasonable," conferred upon him the authority and duty to make the order which this proceeding is instituted to vacate and set aside.

6. That after a careful examination and inspection of the place of intersection of the petitioner's railroad tracks with those of the Union Terminal Association upon the said Clark avenue in the city of Detroit as aforesaid, he determined and decided, under and by virtue of the authority conferred upon him by the said act, that the said crossing was dangerous, and that the general welfare and public good required protection against accident, and to that end, made and entered the said order; that the said safety appliances so required to be constructed and maintained in said order, are not required on account of the presence of the steam road merely, but on account of the intersection of the tracks of the said steam railroad in connection with the tracks of the said petitioner; that if the tracks of the said petitioner were not in Clark avenue, and did not cross the tracks of the said steam railroad, the said safety appliances so ordered as aforesaid, would not be required or necessary in the manner in which the order provides they shall be constructed and maintained; that though the safety gates provided for in such order are designed specially for the protection of the general public, traveling on said highway, from danger resulting from the said steam railroad, still, the derailing and signalling appliances are intended to protect the traveling public on both electric and steam road- from collision at the crossing of the two roads, and that the necessity for the said safety devices results equally as much from the existence and presence of the petitioner's tracks as from the presence of the tracks of the Union Terminal Association.

7. That the first of the tracks of the said Union Terminal
13 Association, as respondent is informed and verily believes were built across Clark avenue, and across the tracks of the, said petitioner, in October, 1881, within a year and a half after consent, permission, and authority had been granted to the Fort Street & Elmwood Avenue Railway Company, its successors and assigns, to lay its tracks in Clark avenue from its intersection with Fort street to the River road; that at the time the said track or tracks of the said Union Terminal Association were built across said Clark avenue and the tracks of said petitioner, that portion of the city of Detroit was not thickly settled, and there was no reason or necessity for such safety appliances which are now required; that the necessity for such safety appliances is the result of the growth of, and changing conditions in that portion of the city of Detroit; that the said petitioner, in accepting rights, privileges and franchises in said Clark avenue, accepted the same subject to the changing circumstances and conditions on account of the growth of the surrounding territory, and such resulting police regulations as the exigencies of the situation require.

This respondent therefore submits that the said order, and the

statute authorizing the same are valid police regulations, and that the mandamus prayed for in said petition should not is-ue.

CHASE S. OSBORN,
Commissioner of Railroads.

HORACE M. OREN,
Attorney General, for Respondent.

STATE OF MICHIGAN, }
County of Ingham. }

On this first day of May, A. D. 1900, before me, a notary public in and for said county, personally came Chase S. Osborn, commissioner of railroads, and made oath that he has read the foregoing answer by him subscribed and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated to be on information and belief, and as to those matters, he believes it to be true.

ALBERT DUNBAR,
Notary Public in and for Jackson County.

(Endorsed:) Filed May 1, 1901. Chas. C. Hopkins, clerk supreme court.

14 STATE OF MICHIGAN:

Supreme Court.

FORT WAYNE & BELLE ISLE R'Y, Relator, }
vs.
CHASE S. OSBORN, Commissioner of Railroads. }

Amended Petition.

To the honorable the justices of the supreme court of the State of Michigan:

The petition of the Detroit, Fort Wayne & Belle Isle railway, a corporation, organized and existing under and by virtue of the laws of the State of Michigan, respectfully shows:

1. That your petitioner is a street railway corporation, organized as such under and by virtue of the provisions of chapter 95, Howell's Annotated Statutes of Michigan, providing for the incorporation of street railway companies, and is now, and has been since its incorporation, engaged in maintaining and operating an electric street railway system in and through the city of Detroit, as hereinafter more particularly set forth.

2. That the Fort Street & Elmwood Avenue railway was a corporation organized under and by virtue of chapter 94, of Howell's Annotated Statutes of Michigan, in February, 1865, for the purpose of constructing and operating a street railway through the streets in the city of Detroit. That said act of the legislature under which said Fort Street & Elmwood Avenue railway was organized, was subject to amendment, and was subsequently amended by an act of

the legislature; which said amendment now constitutes section 3527 of Howell's Annotated Statutes. That by virtue of an ordinance duly passed by the common council of the city of Detroit, January 31st, 1865, Frederick Buhl, John P. Clark and Eber B. Ward, their associates, successors and assigns, were given consent, permission and authority to lay a single or double track railway, with all the necessary and convenient tracks for turnouts, side tracks and switches along, and upon certain of the streets of the city of Detroit, commencing at the westerly limits of the city of Detroit, as then existing, where Fort
15 street intersected said westerly limits—thence easterly through Fort street to Woodward avenue, and upon certain other streets in said city. Said grant, and the powers, rights and privileges conferred thereunder, were to extend and continue for a period of thirty years from the date of the passage of said ordinance. That thereafter all the rights, powers and privileges granted by said ordinance to said Frederick Buhl, John P. Clark and Eber B. Ward aforesaid, were transferred to the Fort Street & Elmwood Avenue railway, a corporation organized as aforesaid. That by special act of the legislature of the State of Michigan, passed in 1871, the title of the street railway was changed from the "Fort Street & Elmwood Avenue railway" to the "Fort Wayne & Elmwood Railway Company." That by an ordinance duly enacted by the common council of the city of Detroit, and approved June 30th, 1880, all the powers and privileges conferred upon the said railway company by the ordinance of January 31st, 1865, before mentioned, and the amendments thereto, were extended and limited to a further period of thirty years.

3. Your petitioner further shows that in the year 1865 the township board of the township of Springwells granted unto the Fort Street & Elmwood Avenue railway, its successors and assigns, full consent, permission and authority to lay a single or double track for a street railway, and all necessary and convenient tracks for turnouts, side tracks and switches in and along certain streets and highways in said township, including the following, to wit: Upon Clark avenue from the intersection of said street with Fort street; thence through Clark avenue to the River road, thence through said River road to a point opposite Fort Wayne. That by a resolution of the township board of the township of Springwells, Wayne county, Michigan, passed on the 17th day of June, 1880, further consent, permission and authority *was* given to the Fort Wayne & Elmwood Railway Company, its successors and assigns, to lay a single or double track for a street railway, and all necessary and convenient tracks for turnouts, side tracks and switches in and along the following streets and highways in said township, to wit: Commencing at the then westerly terminus of the city of Detroit, westerly, through Fort street to the west line of Clark avenue, where it intersects Fort street; thence through Clark avenue to the River road; thence through said River road to a point opposite Fort Wayne, for a period of thirty years from the date of said resolution.

4. That on July 1st, 1892, the said Fort Wayne & Elmwood Rail-

way Company sold and transferred all its rights, franchises and property, including the rights and franchises above mentioned, to the Fort Wayne & Belle Isle Railway Company, a corporation also organized under chapter 95, Howell's Annotated Statutes of Michigan.

16 5. That your petitioner has acquired, by purchase, all of the contract rights, franchises and grants, belonging to the said Fort Wayne & Belle Isle Railway Company herein recited and set forth, and all the lines of street railway constructed, maintained and operated thereunder; that said lines are now being operated under and by virtue of the terms of said contracts, ordinances, grants, and franchises. That your petitioner is possessed of, and has the right to the enjoyment of all the rights and privileges created and granted by the said various contracts, ordinances, resolutions and grants.

That under the authority and permission given by the said city of Detroit, and township of Springwells, said Fort Street & Elmwood Railway Company, the Fort Wayne & Belle Isle Railway Company, and your petitioner, have constructed and maintained continuously a double-track railway upon and along the said Fort street, from said Woodward avenue westerly to the intersection of Clark avenue, and thence through Clark avenue to the River road and beyond. That under and by virtue of the said contracts, franchises and grants aforesaid, your petitioner is entitled to maintain and operate its said line of street railway upon said streets, in the city of Detroit, and particularly upon said Clark avenue, and said streets are now being occupied so far as necessary, for that purpose. That your petitioner is entitled to be protected in the full enjoyment of its contract rights, and particularly in the enjoyment of those rights above set forth.

6. That in the year 1866, under the authority granted as aforesaid, the said Fort Wayne & Elmwood Railway Company constructed a street railway upon Clark avenue from the intersection of Fort street to the River road, and thence upon said River road to Fort Wayne, and had, since said year, through itself and its successors aforesaid, maintained and operated continuously a street railway thereupon.

8. Your petitioner shows that until the year 1882 or 1883 there was no crossing of any kind, either that of a railroad or of a public highway, or private roadway, street or alley over said Clark avenue, between said Fort street and said river road; that about the year 1882 or 1883 a single railroad track was constructed across said Clark avenue, and across petitioner's tracks, by the Wabash, St. Louis & Pacific Railroad Company, or by the Wabash Railroad Company, as it was familiarly known, and that from thenceforth the said track was used by said Wabash Company as a crossing.

That in the year 1893 or thereabouts, the so-called Union Terminal Association opened a new union station or depot at the corner of Fort and Third streets, in the city of Detroit, and that since that time said station has been used jointly by the Wabash Rail-

17 road Company, the Detroit, Lansing & Northern Railroad Company, and the Flint & Pere Marquette Railroad Com-

pany, as a terminal point, the number of tracks over said Clark avenue at this point have been increased from one to three, to accommodate the increased traffic. That within the past three years the Detroit, Lima & Northern Railroad Company has also begun to use the said new union station as a terminal point, and that all of the above roads at the present time run their trains over the aforesaid crossing at Clark avenue. That in addition to the above roads, the Canadian Pacific Railway Company uses the said union station as a terminal, and connects with the Wabash Railroad Company for the purpose of conducting a through east and west passenger and freight business. That at the present time, by reason of these facts, there is a large amount of freight and passenger traffic upon the said railroad tracks, crossing Clark avenue, at this point, there being at the present time thirty-eight passenger trains each day passing thereover.

Your petitioner shows that all of the said tracks, and all of the said traffic were laid and begun after the construction of petitioner's tracks on Clark avenue, as above set forth; that the said railroad tracks are under the control or ownership of the so-called Union Terminal Association, of the city of Detroit, Wayne county, Michigan, and are used by said association for the running of locomotives and cars thereupon, as already appears.

9. Your petitioner respectfully shows that it has been served with a certified copy of an order made by Chase S. Osborn, commissioner of railroads, of the State of Michigan, a copy of which order and certificate is hereto attached, and made a part of this petition, and marked Exhibit "A;" that notice was given by respondent to relator and the Union Terminal Association, and a hearing had, at which relator's representative objected to the making of said order; that by said order, the said Chase S. Osborn, railroad commissioner, aforesaid, recites that after a personal inspection of the crossing of the said railroad tracks, at Clark avenue, he has decided that the public interest requires additional protection to be provided thereat, and under authority claimed by him, said commissioner of railroads has ordered that within sixty days from the date of said order, to wit: the 7th day of March, A. D. 1900, the said Union Terminal Association Railway Company cause to be constructed, and thereafter operated and maintained, safety gates, and derailing and signalling appliances, to be operated day and night by a watchman from a tower; said tower to be constructed at the best point of vision at the said crossing, and so constructed that the operator may have plain view of all trains or cars on both of the respective lines; that derailers shall be provided, and placed in the tracks of the Fort Wayne & Belle Isle railway, not
18 less than 75 feet from clearance point or crossing, and that signals shall be placed on the tracks of the Union Terminal Association, at a distance of not less than 600 feet from said crossing; said derailers and signals to be operated by levers in said tower, and said levers to be properly interlocked. Your petitioner further shows that in said order it is provided that the cost and expense of construction, maintenance and operation of the said gates,

tower and derailing and signalling appliances shall be borne by the Union Terminal Association and the Fort Wayne & Belle Isle Railway Company, equally, share and share alike, and that the appliances aforesaid are to be constructed in accordance with the plans to be submitted to and approved by the commissioner of railroads within thirty days from the date of this order, that is to say, March 7th, 1900. And it is further provided that this order shall be subject to modification at any *when* when, in the opinion of the commissioner of railroads, the public safety will be more effectually secured.

10. Your petitioner further shows that the compliance with this order will involve the expenditure of a large sum of money; first, in the construction of the said safety devices, and after the same are constructed, in the maintenance and repair thereof.

Your petitioner presumes that said railroad commissioner claims authority to make the order aforesaid under act No. 171, Laws of 1893. Your petitioner says, however, that said act was passed long after the organization of said Fort Street & Elmwood Avenue railway, and long after said railway was built in said Clark avenue. That the railroad commissioner has no authority, and could be given no authority to make the said order, or any such order applicable to your petitioner, or to any street railroad organized and constructed prior to the enactment of said statute, or any statute on the subject. That the authority of the said railroad commissioner to make such an order does not extend to your petitioner, nor to the Fort Wayne & Belle Isle Railway Company, and if any such authority has been attempted to be given to said commissioner by the legislature of the State, that the same is void, and any attempt to confer such authority is beyond the power of the legislature, unconstitutional and void, and is an attempt to deprive your petitioner, and other street railroads, organized and constructed, prior to the passage of such act, of its property without compensation, and without due process of law.

Your petitioner shows that before said steam railroad tracks were built across said Clark avenue there was no crossing of any kind, railroad or otherwise, between Fort street and the River road. That said crossing was made for the purely private reasons and convenience of the steam railroads constructing the same.

19 That petitioner's street-railway system on Clark avenue is not an embarrassment to said street, but serves to relieve said street from congestion; is only an improved method of using said street, and an adaptation of the same for more convenient travel and accommodation of the public. That your petitioner and said Fort Wayne & Belle Isle Railway Company should not be made to bear the expense of protecting the public street in question from the danger occasioned by the steam railroads referred to; and that said commissioner of railroads has no more authority to make such order than to compel any other traveler upon said street, or the township or city authorities to bear the expense.

That the necessity, if any there be, for the safety appliances mentioned in said order, and for the construction and maintenance of the

same, including the stationing of a watchman at the crossing mentioned, is not due to the presence of your petitioner's tracks, and the operation of your petitioner's street railway upon said Clark avenue, but on the contrary, is due wholly to the construction of the said lines of steam railroad across said Clark avenue at the point mentioned. That said Clark avenue was an existing highway or public street, and for many years had been used as such at the time said steam-railroad tracks were built across said Clark avenue. That permission for the use of said street for street-railway purposes had been obtained, and the street railway now belonging to petitioner had been constructed and had been in operation for many years prior to the construction of said lines of steam railroad across said street, and was so in operation at the time of the construction thereof, and has been continuously since then to the present time. That the safety devices mentioned in said order are not designed to protect the public, using said highway from the danger of injury from the operation of your petitioner's street railway on said street; and that said appliances will not serve the purpose; but that on the contrary they were designed to protect the public traveling upon said highway from injuries which might otherwise result from the operation of locomotives and cars upon the said lines of steam railroad crossing Clark avenue.

Your petitioner further shows that after the track now belonging to it was laid in the street, and before the said steam-railroad tracks were constructed across said Clark avenue, there was, and could be no necessity for the order aforesaid, nor for any appliances such as therein described, as there was no highway or other crossing at that point. That the said order was made to protect the public using said Clark avenue from accident due to the crossing of said tracks of said Union Terminal Association, and the operation of the same with engines and cars.

Your petitioner shows that safety devices are not made necessary by reason of the operation of its street-railway system in said Clark avenue; that your petitioner has a good and lawful right to be upon said street; and to use the same for the purpose of operating its system; and is entitled to the benefit of the same protection from the increased danger resulting from the crossing of said steam railroad as any other member of the public traveling upon said street and highway, and should not be called upon to incur the expense of rendering said street or highway safe, or protect the same from a danger which is not caused by your petitioner or due to its presence in or use of the street.

11. It is further shown unto this court that if this order of the railroad commissioner is valid, and must be obeyed, the obligations imposed by it, and the expense of compliance therewith, must be borne by your petitioner as the successor of the said Fort Wayne & Belle Isle Railway Company, to which said order is addressed.

12. Your petitioner represents that it is advised that the said order of the railroad commissioner is wholly without authority of law, and is void, and without force; and charges that unless it is so declared by this court, your petitioner will be subject to a penalty

of ten dollars ($10) a day, until said order is complied with. That the enforcement of this order is unjust and oppressive and that unless its enforcement is prevented by this court, your petitioner will be deprived of its property, franchises and rights, without compensation, and without due process of law, and in controvention of section 10, article 1, of the Constitution of the United States, and of a like provision of the constitution of the State of Michigan, and will also be denied the equal protection of the laws in controvention of section 1, of the fourteenth amendment of the Constitution of the United States.

Your petitioner shows that it is without remedy, save in the present application, and prays that your honors cause a writ of mandamus in due form, to be at once issued from this court, commanding and requiring the Honorable Chase S. Osborn, railroad commissioner of the State of Michigan, to vacate the order aforesaid so far as the same requires, commands or directs the Fort Wayne & Belle Isle Railway Company, or your petitioner, to share or bear any of the expense of constructing and maintaining the safety contrivances or appliances mentioned in said order.

DETROIT, FORT WAYNE & BELLE ISLE RAILWAY.
JOS. BAMPTON, *Secretary.*

BRENNAN, DONNELLY & VAN DE MARK,
Attorneys for Petitioner.

STATE OF MICHIGAN, *County of Wayne,* } ss:

Joseph Bampton, being duly sworn, deposes and says that he is the secretary of The Detroit, Fort Wayne & Belle Isle Railway, the foregoing petitioner; that he has read the foregoing petition, and is familiar with the matters set forth, and that the facts therein contained are true.

JOS. BAMPTON.

Subscribed and sworn to before me this fourth day of January, 1901.

JULIAN H. HARRIS,
Notary Public, Wayne County, Michigan.

(Endorsed:) Filed Jan. 5, 1901. Chas. C. Hopkins, clerk.

21 STATE OF MICHIGAN:

Supreme Court.

DETROIT, FT. WAYNE & BELLE ISLE RAILWAY, Relator,
vs.
CHASE S. OSBORN, Railroad Commissioner, Respondent.

It is agreed as follows:

That petitioner's street railway was a single-track horse railway on Clark avenue when first steam railroad track was constructed.

That subsequently, in 1881, it was changed to a double-track street railway and equipped and operated with electric power in 1891. That thereafter, in 1891, a second steam railroad track was constructed and put in operation by the steam railroad company at the crossing in question, and somewhat later a third track for switching purposes was extended across the highway at the point in question, and is now in use for those purposes as desired. That there has been a substantial increase in the amount of business done by the street railway petitioner on its line on Clark avenue since it was first constructed, cars passing said crossing every few minutes. These facts may be considered as incorporated in the petition, anything therein inconsistent being considered as amended. It is also agreed that petition may be further amended so as to allege that the statutory provision and the order of the railroad commissioner in question deprives petitioner of the equal protection of the laws, in contravention of section 1 of the 14th amendment of the Constitution of the United States.

January 9th, 1901.

BRENNAN, DONNELLY & VAN DE MARK,
Attorneys for Relator.

HORACE M. OREN,
Attorney General, Attorney for Respondent.

(Endorsed:) Filed Jan. 9, 1901. Chas. C. Hopkins, clerk.

An order was entered on the ninth day of January, 1901, by consent of both parties, permitting the filing of the foregoing amended petition, and that the same stand in the place of the original petition, and that the answer to the original petition should stand as the answer to the amended petition.

It is as follows:

22 *Order.*

At a session of the supreme court of the State of Michigan held at the supreme court room, in the capitol, in the city of Lansing, on the ninth day of January in the year of our Lord one thousand nine hundred and one.

Present: The Honorable Robert M. Montgomery, chief justice; Frank A. Hooker, Joseph B. Moore, Charles D. Long, Claudius B. Grant, associate justices.

THE DETROIT, FORT WAYNE & BELLE ISLE RAILWAY, Relator,
vs.
CHASE S. OSBORN, Commissioner of Railroads, Respondent. } No. 18215.

In this cause, the attorneys for both parties consenting thereto, it is ordered that the amended petition filed in this cause on January 5, 1901, as amended by stipulation this day, stand as the original petition in the cause, and that respondent's answer heretofore filed, stand as the answer to said petition.

23 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the ninth day of January in the year of our Lord one thousand nine hundred and one.

Present: The Honorable Robert M. Montgomery, chief justice; Frank A. Hooker, Joseph B. Moore, Charles D. Long, Claudius B. Grant, associate justices.

THE DETROIT, FT. WAYNE & BELLE ISLE RAILWAY, Relator, *vs.* COMMISSIONER OF RAILROADS, Respondent. } No. 18125.

This cause coming on to be heard is argued by Mr. Donnelly for relator, and by Mr. F. A. Maynard for respondent, and submitted.

24 Supreme Court.

THE DETROIT, FORT WAYNE AND BELLE ISLE RAILWAY, Re'ator, *vs.* CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan, Respondent.

Opinion.

The following statement of facts is taken from the brief of counsel for relator:

"The petition and answer filed in this cause set out as briefly as practicable the facts in the case. In substance they are that petitioner owns a line of street railway in Detroit, authority to construct and operate which was granted in 1865. In the following year the railway was built, forming a continuous line west on Fort street to Clark avenue, south on Clark to the River road, and then west again on the River road. At the time the track was constructed on Clark avenue there was no railroad, or highway, street, lane or alley or crossing of any kind over Clark avenue between Fort street and the River road.

In 1882 or 1883 the Wabash railroad constructed a single track across Clark avenue and across petitioner's tracks. Up to that time there had been no crossing over Clark avenue between Fort street and the River road, of any kind, either that of a railroad or a public highway, a private way, road, street or alley. In the year 1893, or thereabouts, the union station was opened at the corner of Third and Fort streets in Detroit; and since that time said station
25 has been used jointly by the Wabash, the Detroit, Lansing & Northern, the Flint & Pere Marquette, the Detroit & Lima Northern, and the Canadian Pacific railroads as a terminal point, the tracks over Clark avenue at this point having been increased from one to three to accom-odate the increased traffic. These tracks are used as approaches to the union station, and incoming and out going trains and cars of all the foregoing roads, except the C. P

R. R., pass over said tracks. There are 38 regular daily passenger trains crossing Clark avenue upon these tracks. Besides this the Canadian Pacific uses the station as an eastern terminus connecting with the other roads for purposes of through east and west traffic.

In 1893 the legislature passed an act, No. 171, which provides (sec. 5), that the 'commissioner of railroads shall * * * examine the crossings of the tracks of railroads and street railroads then existing, and order such changes made in the manner of such crossings, or such safeguards for protection against accidents to be provided thereat as in his judgment ought to be made or provided; and shall apportion any expense incident thereto between the companies affected as he may deem just and reasonable.'

Claiming authority under this act the respondent has ordered the construction of certain safety devices and apportioned the expense between the Terminal Association and the Fort Wayne & Belle Isle Railway Company. Petitioner must bear whatever expenses can properly be imposed upon the Fort Wayne & Belle Isle Railway Company."

The petition in this case is filed for the purpose of having the order set aside. The answer alleges that if the street railway tracks were not constructed in said street "and did not cross the tracks of said steam railroad, the said safety appliances so ordered as aforesaid would not be required or necessary in the manner in
26 which the order provides they shall be constructed and maintained; and though the safety gates provided for in such order are designed specially for the protection of the general public, traveling on said highway from danger resulting from said steam railroad, still the derailing and signalling appliances are intended to protect the traveling public on both electric and steam roads from collision at the crossing of the two roads, and that the necessity for the said safety devices results equally as much from the existence and presence of the petitioner's tracks as from the presence of the tracks of the Union Terminal Association."

Counsel for the relator in their brief say,

"There are a number of important questions involved in this controversy, one being the extent of the authority of the railroad commissioner over street railway companies. We feel it necessary, however, to suggest only one of these questions, because the adjudication thereof in the manner we anticipate will render a consideration of the others unnecessary.

We call attention to the fact fully set out in the petition that the necessity for the order of the railroad commissioner, if any there be, is due to the construction of the Terminal Association's tracks after petitioner's tracks were laid. The danger is not caused by petitioner, nor due to its presence in the street. Under the well-settled rule of this court the cost of making the crossing safe must be borne by the company making the crossing and responsible for the danger.

In People *v.* Lake Shore & M. C. R'y Co., 52 Mich. 277, it was decided that a statute requiring a railroad company to bear the expense of constructing and maintaining a crossing for a *crossing*

for a highway which was laid out after the railroad was built was unconstitutional and void. The court said that "as far as the same can be reasonably accomplished it (the crossing road) shall reduce the inconvenience occasioned to the public by its own pecu-
27 liar mode of enjoyment, to a minimum. But when the reason ceases the right of interference must cease." And it was held that the railroad could not be made to bear the expense of crossing because it was "not a contrivance which the existence of the railroad renders necessary, and which otherwise would be needless."

In Chicago & G. T. R. R. Co. *v.* Hough *et al.*, 61 Mich. 507 it was said:

"If a railroad interferes with an existing highway it must bear all the expense of crossing and restoring the highway, as far as practicable, to a safe condition. * * * But as pointed out in 52 Mich. 277, when a new highway is created, then it belongs to those who created it to bear the expense of making the crossing in the condition necessary to meet all the expense and danger it occasions."

The danger which the commissioner wishes to guard against not being in existence before the railroad crossing was constructed, it belongs to the Union Terminal Association, which created it, to "bear the expense of making the crossing in the condition necessary to meet all the expense and danger which it occasions."

The same principle is recognized and enforced in the following cases: Grand Rapids *v.* G. R. & I. R. R. Co. 58 Mich. 647; Commissioner *v.* R. R. Co. 90 Mich. 385; Commissioners etc. *v.* R. R. Co. 91 Mich. 291; Commissioners etc. *v.* R'y Co. 93 Mich. 58; City of Grand Rapids *v.* Bennett, 106 Mich. 528; Sage *v.* Township of Pittsfield, 6 D. L. M. 204; F. & P. M. R'y Co. *v.* D. L. & N. R'y 64 Mich. 350.

An examination of these cases will show, they were all cases where it was sought to obtain a right of way either for a railroad across a highway, or for a highway across a railroad, or a
28 crossing for one railroad over the right of way of another, and none of the cases relate to the question involved here as to who shall bear the expense of additional safeguards ordered upon roads, which have crossed each other for a long period of time. An examination of the cases will also disclose that in proceedings by one road for a right of way over another, there are some inconveniences and burdens which must be borne by the senior road for which it is not entitled to compensation from the junior road. In the case of the F. & P. M. R. R. Co. *v.* D. & B. C. R. R. Co. 64 Mich. 350 the former company sought to obtain a right of way over the railroad track of the defendant company. The commissioners allowed only one hundred dollars for the land taken, and the consequential damages. The defendant company gave evidence tending to show that it would suffer a yearly expense, as the result of establishing the crossing, of fifty dollars cost for maintaining signals, four hundred and twenty-five dollars cost of watchman, and three hundred dollars cost of stopping trains, and claimed the allowance made by the commissioners was grossly inadequate, but the court declined to disturb it.

In discussing the question, Justice Champlin used the following language:

"The question as to what elements of damages should enter into and form a basis of an award when one railroad crosses another has been before the courts of some of our sister States; and while the decisions have not been entirely uniform, the principles underlying them all point to an allowance which shall secure a just compensation within the recognized rules of evidence relating to damages, as including all loss or injury which is the direct result of the appropriation of the land to the new use. They also recognized that there are elements of damage which, aside from being uncertain, remote, or conjectural, are the consequence of regulations by the legislature designed to secure the safety of the public, which are imposed
29 upon all railroad companies alike, and which, in so far as they do not involve any structural change in the property itself in order to make it conform to the new condition, no not afford a basis for compensation.

The result of the decision in Massachusetts was announced by Mr. Chief Justice Gray in Mass. Cent. R. R. Co. *v.* Boston, C. & F. R. R. Co., 121 Mass. 124, tersely as follows:

"A railroad corporation across whose road another railroad or a highway is laid out has the like right as all individuals or bodies politic and corporate, owning land or easements, to recover damages for the injury occasioned to its title or right in the land occupied by its road, taking into consideration any fences or structures upon the land, or changes in its surface, absolutely required by law, or in fact necessary to be made by the corporation injured, in order to accom-odate its own land to the new condition. Com. *v.* Boston & M. R. R. 3 Cush. 25, 53; Old Colony R. R. Co. *v.* Plymouth, 14 Gray, 155; Grand Junction R. R. Co. *v.* County Com'rs of Middlesex, *id.* 553. But it is not entitled to damages for the interruption and inconvenience occasioned to its business; nor for the increased liability to damages from accidents; nor for increased expense for ringing the bell; nor for the risk of being ordered by the county commissioners, when in their judgment the safety and convenience of the public may require it, to provide additional safeguards for travelers crossing its railroad. Proprietors of Locks and Canals *v.* Nashua & L. R. R. Co. 10 Cush. 365, 392; Boston & W. R. R. Co. *v.* Old Colony R. R. Co. 12 Cush. 605, 611; S. C. 3 Allen, 142, 146; Old Colony R. R. Co. *v.* Plymouth, 14 Gray, 155."

In Illinois the principle was laid down in the case of Chicago & W. I. R. R. Co. *v.* Englewood Connecting R'y Co. 115 Ill. 375 (S. C. 23 Amer. & Eng. R. R. Cas. 56), founded upon the manifest
30 fact that the value of a railroad property, outside of the advantages of location and amount of business it controls, consists in the strength, permanency, and durability of its structures, and its adaptability to and capacity for doing railroad business;—

"That, whenever the proposed condemnation and subsequent user will injuriously affect such a property in either of these respects, the injury thus occasioned will form a proper basis for the assessment of damages in a proceeding of this kind."

"In this case the court on the trial excluded all evidence from the jury tending to show that either the value of the respondent's road, or its capacity to do the business of the company, would be impaired by the proposed crossing; and the court, upon a review of the authorities in that State, held that the court below erred. It had previously been held by that court that the law requiring trains to stop before reaching and crossing another road was a police regulation, and might be maintained or repealed at the pleasure of the legislature; that it would therefore be mere conjecture as to what, if any, damages would be sustained for the delay, inconvenience, and trouble produced by complying with the requirements of the statute; and that, independent of the statute, the same duty would be imposed, and that it was too vague and uncertain to be an element of damages. Peoria & P. U. R'y Co. *v.* Peoria & F. R'y Co. 105 Ill. 110."

"The point was more fully considered in an opinion filed at the same time with that above cited, and reported in the same volume, at page 388, in which a rehearing was denied at the March term, 1883, in which the majority of the court held that damages occasioned by the stopping of trains could not be considered in awarding compensation (Chicago & A. R. R. Co. *v.* Joliet, L. & A. R'y Co.). These decisions have not been overruled in that State. Such is also the conclusion reached by the supreme court of Ohio. Lake Shore & M. S. R'y Co. *v.* Cincinnati, S. & C. R'y Co. 30 Ohio
31 St. 604."

"I think that the stopping of trains, whether required by the law as a police regulation, or by the duty of the company in order to secure the safety of persons transported, is not an element which can be considered by the jury in estimating the damages and compensation to be made."

"The general railroad law requires trains to come to a full stop, before crossing the track of another railroad, not nearer than 200 nor more than 800 feet from the crossing. It regulates the precedence which trains shall have in crossing, and prescribes penalties for disobedience of the regulations. These are police regulations enacted by the legislature designed to promote the public safety, and are as binding upon an existing road as one newly organized. They stand upon an equality before the law, and neither can levy tribute upon the other as a compensation for obedience to its requirements. It is subject to amendment or repeal at any time the legislature may see fit; and for this reason, as well as for the absolute impossibility of determining in advance the number of trains which in the future operation of the road would be required to stop at such crossing, the damage arising therefrom, is uncertain and conjectural. But, aside from this, any inconvenience or annoyance or loss suffered in obeying the police regulations of the sovereign authority is *damnum absque injuria.*" * * *

"In the absence of the statute, the duty imposed by the circumstances upon the corporation to adopt and observe proper precautions to protect the lives of persons committing themselves to its care takes the force of law, and has its foundation in the same principles which

underlie police regulations, namely, the protection and welfare of the public. In other words the police regulation requiring trains to stop does not create a new duty, but compels the observance of an existing duty by the corporation. The statute or duty merely
32 regulates the mode in which the corporation shall exercise its franchise. This incident to crossing takes no land, requires no structural change in the property, and deprives the corporation of no right granted by its charter. It does not lie within the scope of injuries for which compensation should be made.

The cost of maintaining signals or a crossing system would be a proper matter for the consideration of the commissioners, as well as cost of watchman. These expenses however, are subject to contingencies which may cause the damages to fluctuate, and possibly be reduced to a nominal sum.

The other cases cited are in harmony with the views expressed by Justice Champlin. These cases undoubtedly establish the doctrine, that within the limits of the rule as described by Justice Champlin, the junior highway or railroad seeking a crossing must bear all the expense of making the crossing and restoring the highway or railroad crossing as far as practicable to safe conditions. This however relates to the conditions as they exist at the time the crossing is made, and not to conditions which may or may not arise thereafter. The damages must be real, tangible and proximate; allowances may not be made for possible or probable contingencies; Grand Rapids *v.* Bennett, 106 Mich. 528 and cases there cited.

We then come to the question of what the status of the two roads is after the compensation is made and the right of user by the junior road is obtained? While this question has never been, so far as we know before this court, it has been before other courts. In Railway *v.* Railway, 30 Ohio St. 604, there is a full discussion of this aspect of the case:

"The franchise to be a corporation, entitled as such to own a right of way and to operate a railroad thereon, is granted by the State for the public benefit, in consideration of the supposed benefits accruing to the State and its people from the improvement and its use.

33 The tangible property held for corporate purposes is a means of carrying out the purposes of the corporation.

Each corporation has granted to it so much of the right of eminent domain as is necessary to obtain its right of way and to construct its road.

The charters of these corporations are obtained under a general law, to authorize the creation and regulation of incorporated companies. 1 S. & C. 271.

The fact that one charter is older than another, does not give it exclusive privileges or superior powers in prosecuting its business as public carrier of persons and property.

If the elder company has exercised its power to condemn property for its right of way, and has constructed and is operating its road, that does not withdraw its property from the equal power of

condemnation of its right of way, for a crossing, to be enjoyed in common by a junior company.

Such appropriation, to be used on equal and common terms, does not operate as a subversion or destruction of the former public use. It is only an increased burden upon its use imposed for public purposes." * * *

"The right of the one to cross the track of the other, is as clear and undoubted as was the right of the other, in the first instance to cross the land of the original owner. They each derive this right by grant from the State and not by purchase of the other.

In each case the constitution protects the private property by requiring compensation to be paid.

The right of transit across a railroad rests upon the same grounds as that of the right of railroads to cross the canals, rivers, and common highways of the State, and is as important a public use as the right of transit along them.

New channels of trade and commerce and new highways
34 for public travel are essential to the growth and development of the State and the convenience and comfort of its people, and the power of the State to provide them is one of those sovereign powers held in trust for the public welfare, which it has no right to grant away or surrender.

This grant to railroad corporations is for the public accom-odation. To assume that the road first located and constructed has the exclusive franchise of operating a road over the point of crossing, and that this right, as well as the property, must be paid for by the second road, does violence to the well-settled public policy of the State.

These corporations owe their existence and the right to exercise their franchises and privileges to the principle, that the State may employ such agencies as it may deem proper to promote the public welfare. These roads are great public highways, and as such are amenable to such reasonable regulations, not inconsistent with vested rights of private property, as will promote that object." * * *

"When both roads are constructed, they are operated under charters granting equal franchises and privileges, and both are alike subject to the obligations that may be lawfully imposed.

When the younger corporation has acquired its right of property in common with the older in a crossing, they become joint and equal owners, bound by mutual obligations to each other and to the public, to so use this common right as to do no unnecessary harm to the other or to the public.

To each corporation the maxim, "*Sic utere tuo ut alienum non lædas*," applies with special force. To enforce the principles of that maxim, and in the legitimate exercise of the police power of the State, the act of March 24, 1860 (S. & C. 372*a*), was passed." * * *

"When the appropriation is made, paid for, and put to
35 the new use, both companies stand on a perfect equality as to rights and privileges in the use of the crossing."

We can see no fault in the logic of this opinion. When the right to use the crossing is once acquired, the right of the several corporations

to this use is reciprocal so far as is consistent with the kind of use made of the crossing by them. Of course in the case of a highway crossing over a railroad, from the very nature of the use the foot passengers and persons traveling in vehicles would be required to stop instead of requiring the trains of cars to stop because this would be the only practicable method of running the trains and ensuring the safety of the public. When the joint use of a crossing is obtained is the position tenable, that because one road is older than another, that the junior road must not only compensate the senior road for its present damage before it can cross, but for all time it must bear any additional future cost which may be made necessary by the erection and maintainance of appliances for the safety of the public, resulting from the increased use of the crossing? We think it logically follows from what has already been said, this question must be answered in the negative.

It is said "it cannot be pretended that without the existence of the steam railroad crossing, the railroad commissioner would have any jurisdiction, or that there would be any danger arising from the operation of the street railway which would call for an interference of the railroad commissioner. His jurisdiction only attaches because of the danger arising from the construction and operation of the steam railroad crossing the highway at the point in question."

It is a complete reply to this suggestion to say that if there was no highway at this point traveled by a line of electric railway cars, and by the public, there would be no occasion for the inter-
36 ference of the railroad commissioner. It is because both of these conditions exist that human life is endangered at this crossing, and under the exercise of the police power in the interest of public safety, the State is authorized to interfere through its agent the railroad commissioner. See Nashvill- etc. Railway *v.* Alabama, 128 U. S. 96; Georgia Railroad & Banking Co. *v.* Smith, 128 U. S. 174; Minneapolis etc. Railway *v.* Beckwith, 129 U. S. 26; Dent *v.* West Virginia, 129 U. S. 114; Charlotte, Columbia etc. Railroad *v.* Gibbes, 142 U. S. 386; Minneapolis & St. Louis Railway *v.* Emmons, 149 U. S. 364; N. Y. & N. E. R. R. Co. *v.* Bristol, 151 U. S. 556; Thorpe *v.* Railroad Co. 27 Vt. 150; Woodruff *v.* Caltin, 6 Atlantic R. 853.

It is insisted by counsel for relator that the action of the railroad commissioner cannot be sustained for another reason. We quote from the brief of counsel:

"We contend that a street railway which has been granted a franchise to occupy a public street, acquires a right to use the same in common with other members of the traveling public, and is not an additional burden upon the street, but is merely an adaptation of the highway to a particular means of travel, and does not constitute an additional servitude. A railroad is, on the other hand, an additional servitude, and if it is built across a highway, it must do all things necessary to render the highway, for all its legitimate uses, as safe as it was before the railroad was built across it, or would be, if such railroad were not built across it at all. The authority for

this view is found in the following cases, and although the facts to which the principles involved were applied differed from those of the case at bar, the principles themselves are involved here and must in our opinion control." Citing Railroad Co. *v.* Street Railroad Co. 26 L. R. A. 337; C. B. & Q. R'y Co. *v.* West Chicago St. R'y Co. 156 Ill. 225; 2 Dill Mun. Corp. 4 ed. sec. 722; 29 L. R. A. 486; R'y Co. *v.* Steel, 47 Neb. 741; Railroad Co. *v.* Railroad
37 Co. 149 Pa. St. 1; Grand Rapids *v.* Heisel 38 Mich. 62; Detroit City R'y *v.* Mills, 85 *id.*, 634; Nichols *v.* Railway Co., 87 *id.*, 369.

None of these authorities touch the question involved here. Nearly all of them except the Michigan cases are referred to in Railway Co. *v.* Steel, 47 Neb. 741. The question involved was whether a railroad company was entitled to damages from a street-railway line, seeking a crossing. In disposing of the case the court said,

"The doctrine of the cases cited, and which to us appears altogether reasonable and sound, is that a railroad company acquires no exclusive use of streets crossed by its tracks with the consent of the city or other municipal body, but must enjoy the right so conferred in common with the general public: that it is presumed to have contemplated the adoption of such improved means of travel as the exigencies of the case require in order to best subserve the public interests and necessities; and that any mere inconvenience suffered by it on account of the crossing of its lines by the tracks of street railways by permission of the proper authorities is *damnum absque injuria*."

In the Michigan cases the question involved was, whether the adjacent owners were entitled to compensation, where the street in front of their land was used by a street railway company. In Railway Co. *v.* Heisel, 38 Mich. 62, Justice Cooley used the following language:

"If the railroad were only a city railway constituting a mere local convenience, and calculated to relieve the pressure of traffic and travel upon the street, the question of course would be different. There are cases which hold it to be competent under proper legislative authority, to permit a street-railway track to be laid, regardless of the consent or of the wishes of abutting proprietors who may own the soil of the street. A street railway for local purposes, so far from constituting a new burden, is supposed to be per-
38 mitted because it constitutes a relief to the street; it is in furtherance of the purpose for which the street is established, and relieves the pressure of local business and local travel instead of constituting an embarrassment. It is for this reason that the owners of lands over which a city street is laid are denied compensation if a street railway is subsequently authorized within it."

The same question was involved in the other Michigan cases where electricity was used as motive power. It was held the adjacent owner was not entitled to compensation under the facts disclosed by those cases, though two of the five judges thought the building

of the street railway did impose an additional burden for which compensation should be given to the adjacent owner.

Though the decisions are not uniform it may be considered as now settled by the great weight of authority that the use of a street by a street railway company, under proper regulations even though it use electricity as a motive power, is not an improper use of the street, and is not such an additional burden as to entitle the adjacent proprietor to additional compensation. It does not follow however, from these decisions that the electric car, and the horseless carriage do not increase the danger to those who have a right to travel the streets. If it be asserted that the propulsion of a modern suburban car, forty-five or fifty feet long, which may be propelled at the will of the motorman at a speed from simply moving to forty or fifty miles an hour through the public streets of a city, is not a different use of the street and a source of greater danger to the public, than obtained when the streets were used only by pedestrians and carriages drawn by horses, such an assertion would not commend itself to the common sense of those having cognizance of the facts. The long list of frightful injuries and fatal casualties which occur yearly because of the new methods of travel in all our large cities, would be a complete answer
39 to the assertion. Does it not follow then that, though the modern methods of travel are required by the conditions of modern life, that inasmuch as they may and do increase the danger to human life, that it is entirely competent for the State in its efforts to protect its citizens in the exercise of its police power to provide such regulations at the expense of the persons or corporations employing the new methods, as in its wisdom it deems necessary to accomplish that purpose? Upon what other theory does it regulate the speed of the vehicles traveling the streets. Why does it require, at the expense of the corporation owning street cars, their frequent inspection, or require them to be equiped with powerful brakes, and with safety fenders? Can there be any question but what it would be legal to require steam boilers used to propel horseless carriages to be so constructed as not to be liable to explosion, or to require the person operating such a carriage to be so familiar with its operation before taking it upon a crowded street, that its appearance there should not be a source of danger? It seems to us there can be but one answer to these questions. New dangers upon the public streets require new safeguards in the interest of the safety of the public. It is a matter of common knowledge that where electric cars run at frequent intervals, across a railroad over which trains are frequently run, that it is a place of unusual danger, not only to the passengers in the steam cars but also to the passengers in the electric cars. This danger is occasioned not by the steam road alone, nor by the electric road alone, but by both of them. We have no doubt that under such circumstances the State, in the exercise of its police power can take such steps as will minimize the danger and can impose the expense of doing so, upon the corporations causing the danger.

In Maine a statute similar to the statute of this State, was
40 passed in 1895, authorizing the railroad commissioners in such a case as this one, to apportion the expense between the electric road and the steam road, thought it did not require them to do so. Under this statute the case of Railroad Co. *v.* Street R'y Co. 89 Me. 328 arose. In that case it was claimed as it is claimed here, that the use of the crossing of the steam road by the electric road was simply a use of the highway. We quote from the decision of the commissioners:

"But the counsel for the electric railway company goes further, and in argument claims that by its charter, his company has the right for its electric cars to pass and repass across the rails of the Maine Central Railroad Company, and over the highway, the same as any other vehicle on said highway, and that the Maine Central Railroad Company is obliged, under the law, to make proper provisions for the passage of electric cars across its railroad tracks. He argues that the car of the electric railway is nothing more than the team or vehicle of any other person, or corporation, which has a right to pass and repass within the highway. He argues that the building of an electric railway along the highway in this State is not a new servitude upon the street, and is not a new use of the way, but is only a new and later mode of using the way."

Under the circumstances of that case the commissioners put the expense of putting in the new crossing frogs entirely upon the electric road. The case was removed to the supreme court which declined to disturb the decision of the commissioners, the court using the following language:

"The act of 1895, c. 72, undoubtedly authorizes the railroad commissioners to apportion the expense, but it does not require them to do so. It leaves the question to their sound judgment and discretion. And, on appeal, the only rule prescribed for the presiding justice is that he shall make such order or decree as law and
41 justice shall require. The statute declares that 'exception may be taken to such order or decree,' but it prescribes no rules by which the law courts shall be governed in passing upon the exceptions. It seems to us that the evident intention of the legislature was to leave the whole question of how railroad crossings should be constructed and maintained, and how the expense of such crossings should be borne, in the first instance to the sound judgment and discretion of the railroad commissioners, and we think that their decision should not be altered or reversed unless manifestly illegal or unjust." See Commissioners *v.* Railroad Co. 91 Mich. 291; Woodruff *v.* Catlin, *et al.*, 6 Atl. R. 849; Railroad Co. *v.* Bristol 151 U. S. R. 556.

We have no doubt of the right of the legislature to authorize the railroad commissioner to do what he has sought to do here.

The petition of the relator is denied.

J. B. MOORE.
R. M. MONTGOMERY.
CHAS. D. LONG.

(Endorsed:) Filed July 2, 1901. Chas. C. Hopkins, clerk supreme court.

42 Supreme Court.

DETROIT, FORT WAYNE & BELLE ISLE RAILWAY, Relator,
vs.
CHASE S. OSBORN, Commissioner of Railroads, Respondent.

GRANT, *J.:*

The petitioner owns a line of street railway in Detroit, authority to construct and operate which was granted in 1865. In the following year the railway was built, forming a continuous line west on Fort street to Clark avenue, south on Clark to the River road, and then west again on the River road. At the time the track was constructed on Clark avenue there was no railroad, or highway, street, lane or alley or crossing of any kind over Clark avenue between Fort street and the River road.

In 1882 or '3, the Wabash Railroad Company constructed a single track across Clark avenue and across petitioner's tracks. Up to that time there had been no crossing over Clark avenue between Fort street and the River road, of any kind, either that of a railroad or a public highway, a private way, road, street or alley. In the year 1893, or thereabouts, the union station was opened at the corner of Third and Fort streets in Detroit; and since that time said station has been used jointly by the Wabash, the Detroit, Lansing & Northern, the Flint & Pere Marquette, the Detroit & Lima Northern, and the Canadian Pacific railroads as a terminal point, the tracks over Clark avenue at this point having been increased from one to three to accom-odate the increased traffic. These tracks are used as approaches to the union station, and in-
43 coming and outgoing trains and cars of all the foregoing roads, except the C. P. R. R., pass over said tracks. There are 38 regular daily passenger trains crossing Clark avenue upon these tracks. Besides this the Canadian Pacific uses the station as an eastern terminus connecting with the other roads for purposes of through east and west traffic.

In 1893, the legislature passed an act, No. 171, section 5 of which provides that the "Commissioner of railroads shall * * * examine the crossings of the tracks of railroads and street railroads then existing, and order such changes made in the manner of such crossings, or such safeguards for protection against accidents to be provided thereat as in his judgment ought to be made or provided; and shall apportion any expense incident thereto between the companies affected as he may deem just and reasonable."

Claiming authority under this act the respondent ordered the construction of certain devices, and apportioned the expense between the Terminal Association and the petitioner.

The validity of this order presents the main question in the case.

The main question in this case may be thus stated: When a steam railroad company has condemned a right of way and extended its

tracks across a public street or highway, on which is an existing street-car line, and at the time the public travel upon the street or highway was not such as to require the erection of gates, etc., for the protection of the public, but subsequently, owing to the increase of population, the increase of tracks and trains by the railroad company, and the increase of travel upon the street or the highway, the erection and maintenance of such safeguards becomes essential for the protection of the public, can the street railway company
44 be required to pay a portion of the expense?

It is now the settled law of this State, that a street railway does not create an additional servitude. People *v.* Railway Company, 92 Mich. In addition to the authorities cited in Detroit, etc. R. Co. *v.* Mills, 85 Mich., and Nichols *v.* Railway Co., 87 *id.*, see also the following: Chicago, etc., R. Co. *v.* Whiting, etc., 139 Ind. 297, 26 L. R. A. 337; Chicago, etc. R. Co. *v.* West Chicago, etc., R. Co., 156 Ills. 255, 29 L. R. A. 485.

Another well-settled principle is of importance in this discussion, viz: A steam railroad in constructing its tracks across an existing highway must pay all the expense of putting the highway in safe condition and erecting and maintaining such safeguards as are required for the protection of travelers upon the street or highway, as well as those who are traveling upon the steam cars. The correlative proposition is also well established, viz: When a public highway is laid out across an existing railroad, the public must compensate the railroad company, not only for the value of the land taken, but also for the construction of requisite safeguards, including gates, flagmen, fences, cattle-guards, etc., for the protection of the public. Chicago, etc., R. Co. *v.* Hough *et al.*, 61 Mich., 507; Grand Rapids *v.* G. R. & I. R. Co., 58 *id.* 641, 648; Commissioners, etc., *v.* Mich. Cent'l R. Co., 90 *id.* 385; Commissioners, etc., *v.* R. R. Co., 91 *id.* 291; City of Grand Rapids *v.* Bennett, 106 *id.* 528; 8 Am. & Eng. Enc. Law, (2d ed.) 351; Du Bois T. P. R. Co. *v.* Buffalo, etc., R. Co., 10 Pa. C. C. 401.

The elements of damages in such cases are ably discussed by Chief Justice Champlin, in F. & P. M. R. Co. *v.* D., L. & N. R. Co., 64 Mich. 350, and many authorities there cited.

Another well-established principle, important to be here noted, is this: He who creates and maintains a nuisance must pay
45 the cost of abating it; and that business which in its management endangers the persons and property of others, must pay the expense of taking the necessary precaution to avoid the danger,—and it matters not whether that danger existed at the time of the establishment of the business, or arose afterwards. It follows, that in 1882, the Wabash Railroad Company, when it constructed its single track across the highway, and in 1893, when the Union Terminal Association placed its tracks across, they were required by law to pay the expense of all appliances at that time necessary for the protection of the public. So too, if these companies were now making application to cross the highway, they would be compelled to pay the expense of all the appliances which, in this proceeding, the commissioner has divided equally between the relator and the

Union Terminal Association, and would be obliged to do so so long as they did business.

The argument of the learned attorney general seems to be that because, under the circumstances as they existed when the Wabash Railroad Company and the Union Terminal Association constructed their roads, damages for the cost of the appliances now required would then have been uncertain and speculative, and could not have been considered; therefore these companies cannot now be required to bear the entire expense. He states his position as follows:

"In behalf of respondent, I claim that said cases, while establishing the doctrine that a railroad company, whose track is crossed, is entitled to just compensation for all damages which it may have sustained, by reason of such crossing, do not sustain the claim made by counsel for petitioner, namely: that the Union Terminal Association Railway Company must for all time bear the expense for constructing and maintaining the safety contrivances and appliances mentioned in the commissioner's order, for the simple
46 reason that, under the facts and circumstances of this case, the expense of constructing and maintaining said safety contrivances is not an element which can be considered in making up the just compensation to which petitioner is entitled under the constitution and laws of this State. * * * This court has never decided that where the necessity of safety appliances is created some 15 or 20 years after the crossing is made, solely in consequence of changed circumstances and conditions, resulting from the growth of the surrounding territory, that the road whose tracks were first laid, shall be forever exempt from the burden of assisting in constructing and maintaining safety appliances made necessary by such changed conditions."

The injustice to the railroads is not apparent, because by holding them to bear the expense, they are doing no more than the law would clearly require of them if they were now seeking to cross the highway. What is it that causes the danger to travelers upon the highway? Clearly it is not the street cars; it is the trains of the railroad companies. The street car companies by relieving travel, may fairly be held to lessen the danger to otherwise overcrowded streets. Why should the street car company any more than an omnibus line or a stage company, using the same streets, be required to pay for the expense of protecting the public? If it be said that there is danger to travelers upon the steam railway from the street cars, the answer is ready that they are no more dangerous than heavy trucks, van wagons, stages drawn by four or six horses, or other vehicles. The street cars differ only from other methods of travel in that their carriages run upon rails. They have no more rights in going over the streets than other travelers have, except that other travelers are required reasonably to give the cars the right of way. Under the police power these street-car companies are subject to all reasonable rules in running their cars. They may be, and
47 now are, required by law to stop their cars a certain distance from the railroad crossing, and not to cross until some em-

ployee has gone to the railroad track and signalled that the track is clear. The same rule might be required of stage coaches and any other conveyances with heavy loads.

In Du Bois T. P., etc., R. Co. *v.* Buffalo, R., etc. R. Co., *supra*, the complainant, the street railway company, filed its bill in equity to restrain the defendant, steam railway company, from interfering with the construction of its tracks in the public highway across the railway tracks. The defendant used force to prevent the construction. In the suit the defendant claimed that the street railway company should pay damages to the defendant for injury to its business. It was there said: "The respondent holds this right (the use of the street) subject to all the consequences flowing from the ever-increasing travel upon Booth street, and the use of all methods discovered or discoverable for the accommodation of the travel upon the surface of the street; and if the respondent suffers any damages arising from the crossing of its tracks by the public it is of a kind which it must be held to have assumed to itself when it entered upon Franklin street. * * * The crossing of its track by the passenger railway company gives no greater right to damages in the view we take of the case, than it could have if the claim was made against an omnibus line." This case was approved in 149 Pa. St. 1. That case is quoted with approval in C., B. & Q. R. Co. *v.* Steel, 47 Neb. 741, where the authorities are reviewed, and the court holds "that it (the steam railroad company) is presumed to have contemplated the adoption of such improved means of travel as the exigencies of the case require in order to best subserve the public interests and necessities."

In Chicago, etc., R. Co. *v.* Whiting, etc., *supra*, it was held that the street railway company was in the enjoyment of the
48 public easement and use of the street, and that the right of the street railway to cross the tracks of the steam railway was subject to no conditions other than those to which the general public is subject in traveling over such streets. The court said:

"It (the steam railway) never owned its right of way over and across the streets named, free from the burden of the public easement, a part of which belongs to the appellee, the street railway company."

The true rule seems to be that when a railroad company crossing a public street or highway, in the absence of any limitations in its charter, it obtains its right subject to all lawful uses to which the street may be put. It obtains its right subject to the well-known fact that conditions change with the growth of population, and that it itself must meet the expense which these conditions have made necessary for the protection of travelers upon the highway or street.

The learned attorney general seems to concede that were it not for this street railway, the commissioner, under the law and the police power, could place upon these railroads the entire cost of erecting and maintaining these appliances.

As we have shown and held, the street car company is a lawful user of the highway and, as such user, it cannot be selected to pay

the whole or any part of the expense required for the protection of all who travel upon the highway or upon the railroad.

This disposal of the case renders it unnecessary to determine the other questions raised.

Since writing the above I have received the opinion of my brother Moore. The question involved is of such great importance that I feel justified in making a brief reply.

It is well to keep in mind the precise question for our determination. The question is not between two steam railroads crossing each other on private grounds or on the public highway. Neither
49 is it between steam railroads and the entire public using the highway. It is between steam railroads and one user of the public highway,—and the question is who shall pay for the protection of the entire public? or, in other words, can one user of the public highway be required to pay part or all the expense of protecting all users of the highway, and as well those traveling upon the steam road? It must also be borne in mind that no one is seeking to abridge, lessen or destroy the police power of the State to adopt any and all regulations which are necessary to protect the persons and property of those using the highway or the steam road. This power remains the same. The State, either directly or through the municipality, can regulate the speed of street cars within 100, 500 or a 1,000 feet of the crossing. It can compel them to stop at any distance from the crossing. It can regulate the speed of the steam car when approaching. It can, as it now does, compel an employee on the street car to advance to the track before crossing and see whether the crossing is safe. It may compel the steam road to erect gates, etc.

I quote again from Chicago, etc., R. Co. *v.* Whiting, etc.:

"So long, therefore, as it is the settled law of this State that a street railway is not an additional burden to that of the easement the general public has in the street, and that the street railway company's right to use the street is founded on that easement, that long it must be held the right of such street railway to cross over the tracks of the steam railway laid on such street is subject to no conditions other than those to which the general public is subject in traveling over such streets. When the steam railway company obtains its right of way over and along a public street, it does so subject to the right of the general public to use that street, and the street crossings over its tracks; and it is generally incumbent on such steam railway companies to make such crossings as passable for the general public as they were before the construction of their tracks thereon."

50 The logic of this case and others cited by me upon the same point is, that the street railway is a proper, legitimate and necessary use of the public highway, and that it cannot be made subject to conditions "other than those to which the general public is subject in traveling over the streets." Wherein is the logic of compelling one user of the public highway to pay the whole or part of the expense in protecting all users of the highway against the dangers incident to the passage of long, swift and ponderous trains of steam

cars? It is not the street car which causes the congestion of travel at this point; on the other hand, it relieves the congestion. The congestion is caused by the increase of population,—by vehicles of all sorts, engaged in the transportation of goods and passengers, and as well travelers on foot.

My brother refers to the horseless carriage as probably increasing the danger to those who have the right to travel in the streets. Will it be contended that the owners of horseless carriages could be selected from the owners of other vehicles using the highway and compelled to in part or entirely pay for the expense of gates, etc., at a railroad crossing?

If a cartage company, a corporation, were engaged in the transportation of goods with its heavy trucks and enormous loads over this highway every fifteen minutes or half hour in the day, could it be compelled to pay part or all of the expense to avoid the danger caused by the trains of the steam roads? Many vehicles with their loads are as heavy, and sometimes nearly or quite as large, as ordinary street cars. The tally-hoes, with four or six horses, are certainly as dangerous at these crossings as are the street cars. But for the street cars there would be more conveyances of other character, and more congestion of travel at these crossings; and consequently more danger than results from the use of the street cars.

It is urged that the facts in the cases I have cited are not those of this case, and that the precise question now before us was not involved in them. This is true. The same may be said of the cases cited in my brother's opinion, unless it be the Maine case, to which I will refer hereafter. The question is a new one, and calls for the application of principles to be deduced, so far as possible, from
51 the decided cases, and by the application of sound legal principles.

My brother says:

"If there was no highway at this point traveled by a line of electric railway cars, and by the public, there would be no occasion for the interference of the railroad commissioner. It is because both of these conditions exist that human life is endangered at this crossing, and under the exercise of the police power in the interest of public safety, the State is authorized to interfere through its agent the railroad commissioner." Citing several cases.

Will it be said that if there were no electric cars there would be no necessity of interference by the commissioner or some other authorized body to protect the public and prevent danger? Is the electric car the sole cause of the danger so far as it is caused by the using of the highway? Might not the danger be as great, or even greater, without the street car? The cases cited by my brother relate to fences, cattle-guards, farm crossings, and the like, and do not touch this case. The statement of my brother that "under the exercise of the police power in the interest of public safety, the State is authorized to interfere," is the conceded law. But does that affect the question who shall pay for these safeguards?

The authorities cited, apportioning the expense where one steam

road crosses another, are not, in my judgment, applicable. He quotes extensively from Railroad Company *v.* Railroad Company, 30 Ohio St. 604. I understand the rule laid down in that case is the general rule approved by this court, and is applicable only to steam railroads, whether they cross one another on private grounds or the public highway. It has never been applied to street railways.

I am not aware, as my brother suggests, that street cars in cities are allowed a speed of from 40 to 50 miles per hour. No ordinance so providing has ever been called to my attention. I doubt
52 whether there are as many accidents at street-car crossings from collisions with street cars as with other vehicles. The fact that there are frightful injuries and fatal casualties in the streets of the city, in consequence of collision with street cars, does not affect this question. Those accidents may result from the negligence of travelers, or from the employees of the street car companies, or both; or, from too great a speed allowed by the city, or in violation of the city ordinance. The question we are dealing with is one entirely foreign to those.

Railroad Company *v.* Street Railway Co., 89 Mo. 398, is cited as a case in point. The language quoted by my brother from that case must be read and understood in connection with its facts. The steam-railroad tracks were first laid. The street railway company recognized its duty, when it crossed, to place the necessary crossing frogs at its own expense. That this would be the legal duty of the street railway company would hardly be questioned. These frogs were a part of the track of the street railway, and were necessary in its construction. They had become so worn as to be dangerous. The street railway company claimed that it was the duty of the steam railroad company to replace them, and to make proper provisions for the passage of the electric cars across the tracks of the steam road,—a proposition which could not commend itself to any one's judgment. The railroad commissioners very properly held that the street railway company should bear the expense essential to enable it to cross the defendant's track, and to keep it in repair. No other conclusion, in the exercise of good sense, could have been reached. The syllabus of the opinion reads as follows: "Whenever an alteration is made in an existing railroad track for the sole convenience and accommodation of another railroad, the expense should be borne by the latter." No question of the exercise of the police power was discussed or apparently involved. I am unable to see that that case controls this.

The question before us is not whether the legislature may enact that the expense of crossing similar to this shall be borne in
53 whole or in part by the entire public; nor whether the street car company, in putting its tracks across a steam road, can be compelled to make an overhead crossing at its own expense. We are dealing with a case where the natural growth of public travel, through the increase of trade and population, has made the proposed safeguards necessary for the protection of all,—and where the

attempt is made to make one user of the public highway bear half the expense to the exclusion of all others.

The writ should issue.

C. B. GRANT.

Hooker, J., did not sit.

(Endorsed:) Filed July 2, 1901. Chas. C. Hopkins, clerk supreme court.

54 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the second day of July in the year of our Lord one thousand nine hundred and one.

Present: The Honorable Robert M. Montgomery, chief justice. Frank A. Hooker, Joseph B. Moore, Charles D. Long, Claudius B. Grant, associate justices.

DETROIT, FORT WAYNE & BELLE ISLE RAILWAY, Relator,
vs.
CHASE S. OSBORN, Commissioner of Railroads, Respondent. } No. 18125.

This matter having been heretofore heard upon the petition of relator, and the answer of respondent, and the same having been argued by counsel and duly considered by the court, and it appearing to the court, upon such consideration, that the writ of mandamus as prayed for by relator, ought not to be granted, it is hereby denied, with costs to the respondent, to be taxed.

55 To the Hon. Robert M. Montgomery, chief justice of the supreme court of the State of Michigan:

The petition of the Detroit, Fort Wayne & Belle Isle Railway respectfully shows:

1. That it is the petitioner named in the original and amended petition, as the relator in an action -or writ of mandamus against Chase S. Osborn, railroad commissioner of the State of Michigan heretofore pending, and decided in said supreme court, and that said Chase S. Osborn filed an answer to said petition joining issue, and raising an issue of law, which proceeded to a hearing, and a final judgment in said court.

2. That the rights claimed by the petitioner in its said petition were substantially as follows, namely: That it was the owner of a street railway, in, along and upon Clark avenue in the city of Detroit, which was, and had been for many years, a public street or highway, and that said street railway was constructed and in operation upon said street ever since 1865, under grants from the city of Detroit, and the township of Springwells, the municipal corporation preceding the city of Detroit, and having jurisdiction over the street or highway in question. That subsequently the Wabash Railway Company constructed and maintained a steam or commercial road, with three tracks, operated upon a private right of way across said

highway, and across the track of petitioner. That said Chase S. Osborn, as commissioner of railroads, had directed the installation of safety devices at the crossing in question, and had directed that one-half the cost of installation and maintenance thereof be charged to your petitioner. That said Osborn claimed the power and authority to do so under the provisions of section 5 of an act number 171 of Public Acts of 1893, entitled "An act to regulate the construction of tracks of railroads and street railroads across each other, and the stringing of wires, electric or other over railroad tracks, and relative to the maintenance of such tracks heretofore constructed and wires heretofore so strung."

56 3. The said petitioner in said application, claimed that the said order of said railroad commissioner was invalid, for among other reasons, that it was thereby deprived of its property, franchises and rights, without compensation, and without due process of law, and in controvention of section 10, article 1, of the Constitution of the United States, and also that it was denied the equal protection of the laws in controvention of section 1, of the fourteenth amendment of the Constitution of the United States. That the said court in deciding said cause adversely to this petitioner, denied to it the equal protection of the laws in controvention of section 1, of the fourteenth amendment to the Constitution of the United States, and the rights claimed by your petitioner thereunder, and further denied the right of said petitioner claimed under section 10, of article 1, of the Constitution of the United States in that it was deprived of its property, franchises and rights without compensation, and without due process of law.

4. That on the issue framed therein, said cause went to a final hearing, and the final order and judgment of said court was entered dismissing said petition, and denying the writ of mandamus prayed for, and denying to said petitioner the rights claimed under the Constitution of the United States above set forth.

Your petitioner further shows that said supreme court of Michigan is the court of last resort in said State, and it has no appeal from final judgment of said court to any other court in said State.

Therefore your petitioner respectfully requests that you endorse hereon, or on the draft of the writ of error hereto attached, an order allowing the issuing of a writ of error to remove the record in said cause to the Supreme Court of the United States, for review, in accordance with the provision of section 709 of the Revised

57 Statutes of the United States of 1878; and that a citation may issue, signed by you, directed to said defendant, as required by rule.

And your petitioner will ever pray &c.

July 8, 1901.

THE DETROIT, FORT WAYNE &
BELLE ISLE RAILWAY,
By JOHN C. DONNELLY, *Its Attorney.*

JOHN C. DONNELLY &
M. BRENNAN,
Counsel for Petitioner.

Let a writ of error issue as prayed for in the foregoing petition.

R. M. MONTGOMERY,
Chief Justice of the Supreme Court of Michigan.

July 10th, 1901.

57½ [Endorsed:] Supreme court The Detroit Fort Wayne and Belle Isle Railway pl'ff in error *vs.* Chase S. Osborn commissioner &c. def't in error Petition Filed July 10, 1901 Chas. C. Hopkins clerk John C. Donnelly Michael Brennan, attorneys for pl'ff in error.

58 In the Supreme Court.

THE DETROIT, FORT WAYNE & BELLE ISLE RAILWAY, Relator,
vs.
CHASE S. OSBORN, Commissioner of Railroads.

In this cause on reading the petition of the said Detroit, Fort Wayne & Belle Isle railway, praying that a writ of error may be allowed to issue in the above-entitled cause, to remove the same to the Supreme Court of the United States for review, which said petition is accompanied by a satisfactory bond as required by the statute, and rule in such case made and provided together with a like bond to the clerk of the Supreme Court of the United States for his fees and also by an assignment of errors, it is ordered that a writ of error, in accordance with the prayer of said petition be and the same is hereby allowed.

[Seal of the Supreme Court of Michigan, Lansing.]

R. M. MONTGOMERY,
Chief Justice of the Supreme Court of Michigan.

July 10th 1901.

58½ [Endorsed:] Supreme court Detroit Fort Wayne & Belle Isle R'y *vs.* Chase S. Osborn Order Brennan, Donnelly & Van de Mark, att'ys for relator, 65 Moffat bldg., Detroit, Mich.

59 *Citation.*

To Chase S. Osborn, commissioner of railroads, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office, of the supreme court of the State of Michigan, wherein The Detroit, Fort Wayne & Belle Isle Railway is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Robert M. Montgomery, chief justice of

the supreme court of the State of Michigan, this tenth day of July, in the year of our Lord one thousand nine hundred and one.

R. M. MONTGOMERY,
Chief Justice of the Supreme Court of the State of Michigan.

I hereby acknowledge due service on me of a copy of the foregoing citation this tenth day of July, A. D. 1901.

HORACE M. OREN,
Attorney General,
By [name illegible.]

I hereby acknowledge due service on me of a true copy of the foregoing citation on July 10, 1901.

CHASE S. OSBORN,
Commissioner of Railroads,
By HENRY E. CHASE,
Deputy Att'y Gen'l.

59½ [Endorsed:] Supreme court The Detroit Fort Wayne & Belle Isle Railway pl'ff in error *vs.* Chase S. Osborn commissioner def't in error Citation John C. Donnelly Michael Brennan attorneys for pl'ff in error.

60 THE DETROIT, FORT WAYNE & BELLE ISLE RAILWAY, Relator,
vs.
CHASE S. OSBORN, Commissioner of Railroads, Respondent.

STATE OF MICHIGAN, *County of Wayne,* } *ss:*

Julian H. Harris being duly sworn deposes and says that on the tenth day of July, 1901, he served upon Horace M. Oren, attorney for Chase S. Osborn, defendant in error and attorney general of the State of Michigan, by leaving the same with Henry E. Chase, deputy attorney general, then in charge of the office of the said Oren, at Lansing, Michigan, as attorney for Chase S. Osborn, commissioner of railroads of the State of Michigan, a copy of the citation in the above-entitled cause of which the within is a copy, commanding the said Chase S. Osborn, commissioner as aforesaid, to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date of said citation, and which citation is dated the 10th day of July, 1901, and signed by R. M. Montgomery, chief justice of the supreme court of the State of Michigan.

JULIAN H. HARRIS.

Subscribed and sworn to before me this 11th day of July, 1901.

ALEXANDER MUNRO,
Notary Public, Wayne County, Michigan.

[Seal Alexander Munro, Notary Public, Wayne County, Mich.]

61 (Copy.)

Citation.

To Chase S. Osborn, commissioner of railroads, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Michigan, wherein The Detroit, Fort Wayne & Belle Isle Railway is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Robert M. Montgomery, chief justice of the supreme court of the State of Michigan, this tenth day of July in the year of our Lord one thousand nine hundred and one.

(Signed) R. M. MONTGOMERY,
Chief Justice of the Supreme Court of the State of Michigan.

61½ [Endorsed:] Supreme court. Detroit, Fort Wayne & Belle Isle Railway, plaintiff in error *vs.* Chase S. Osborn, commissioner, defendant in error. Proof of service of citation. Filed Jul 12, 1901. Chas. C. Hopkins, clerk supreme court. John C. Donnelly, Michael Brennan, att'ys for pl'ff in error.

62 (Copy.)

Bond.

Know all men by these presents, that we, The Detroit, Fort Wayne & Belle Isle Railway, a corporation organized under the laws of Michigan, as principal, and Michael Brennan and John C. Donnelly, of Detroit, Michigan, as sureties, are held and firmly bound unto Chase S. Osborn, commissioner of railroads, in the full sum of five hundred dollars, to — *pay* to the said Chase S. Osborn, commissioner of railroads, or his certain attorney, executor, administrator, successor or assign to which payment well and truly to be made we bind ourselves, our heirs, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this tenth day of July, 1901.

Whereas, lately at a session of the supreme court of the State of Michigan, in a suit pending in said court, in which said principal obligor was petitioner and relator, and the said obligee was the defendant and respondent, a final judgment was rendered against the said petitioner and relator denying the relief prayed for in the said petition, and said principal obligor having obtained a writ of error, and having filed the same in the office of the clerk of this court, to reverse the said final judgment aforesaid, and the citation directed to the said Chase S. Osborn, commissioner of railroads, citing and

admonishing him to be and appear in the Supreme Court of the United States — be holden at Washington, on the second Monday of October next, was duly issued.

Now the condition of the above obligation is such that if the said Detroit, Fort Wayne & Belle Isle railway shall prosecute its said writ of error to effect and answer *of* damages and costs if it fails to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

DETROIT, FORT WAYNE & BELLE ISLE RAILWAY,
By MICHAEL BRENNAN, *President.*
MICHAEL BRENNAN.
JOHN C. DONNELLY.

Signed sealed and delivered in the presence of—
STEWART O. VAN DE MARK.
JOHN H. HARRIS.

63 STATE OF MICHIGAN, } ss:
County of Wayne, }

M. Brennan and John C. Donnelly being each duly sworn doth each for himself depose and say that he is worth the sum of five hundred dollars in property subject to execution over and above all debts, dues and demands and exemptions.

MICHAEL BRENNAN.
JOHN C. DONNELLY.

Subscribed and sworn to before me this 10th day of July, 1901.
JOHN H. HARRIS,
Notary Public, Wayne County, Mich.

I hereby approve of the foregoing bond and the sureties thereon. July 10th, 1901.
R. M. MONTGOMERY,
Chief Justice of the Supreme Court of Michigan.

(Endorsed:) Filed July 10, 1901 Chas. C. Hopkins, clerk.

64 *Bond to Clerk Supreme Court United States.*

Know all men by these presents, that we, The Detroit Fort Wayne and Belle Isle Railway, a corporation organized and existing under and by virtue of the laws of the State of Michigan, as principal, and Michael Brennan and John C. Donnelly, as sureties, all of the city of Detroit, county of Wayne and State of Michigan, are held and firmly bound unto James H. McKenney, clerk of the Supreme Court of the United States, in the full and just sum of two hundred dollars ($200), current money of the United States, to be paid to the said James H. McKenney, his heirs, executors, administrators or assigns; to which payment well and truly to be made, we bind our-

selves, our heirs, executors, administrators successors and assigns, jointly and severally firmly by these presents.

Sealed, with our seals and dated this tenth day of July, in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a session of the supreme court of the State of Michigan, in a suit depending in said court, between The Detroit Fort Wayne and Belle Isle Railway, relator, and Chase S. Osborn, commissioner of railroads, as respondent, a final judgment was rendered against said relator, denying the relief prayed for in said relator's petition, and the said Detroit Fort Wayne and Belle Isle Railway, relator as aforesaid, having obtained a writ of error to remove the said cause to the Supreme Court of the United States, and filed a transcript of the record of said court in said cause in the office of the clerk of the Supreme Court of the United States to reverse the judgment in the aforesaid suit:

Now, the condition of the above obligation is such, that if the said obligors shall well and truly pay or cause to be paid to the said James H. McKenney, his heirs, executors, administrators or assigns, all such fees as shall accrue to him the said James H. McKenney, clerk as aforesaid, and charged to the said The Detroit Fort Wayne and Belle Isle Railway, in the prosecution of the said writ of
65 error, then the above obligation to be void, otherwise to remain in full force and virtue.

THE DETROIT, FORT WAYNE AND BELLE ISLE RAILWAY,
By MICHAEL BRENNAN, *President.*
MICHAEL BRENNAN. [L. S.]
JOHN C. DONNELLY. [L. S.]

Signed sealed and delivered in the presence of.

ALEXANDER MUNRO.
LEOPOLD A. KOSCINSKI.

STATE OF MICHIGAN, } ss:
County of Wayne, }

Michael Brennan and John C. Donnelly, sureties upon the foregoing bond, being duly sworn, doth each for himself depose and say that he is a resident and freeholder of the county of Wayne and State of Michigan, and is possessed of property of the value of over two hundred dollars over and above all incumbrances, indebtedness and exemptions from sale on execution, and all liability on other similar bonds, and that he has signed the foregoing bond.

MICHAEL BRENNAN.
JOHN C. DONNELLY.

Subscribed and sworn to before me this tenth day of July A. D. 1901.

ALEXANDER MUNRO,
Notary Public, Wayne County, Michigan.

I hereby approve the foregoing bond.
July 10 1901.

R. M. MONTGOMERY,
Chief Justice.

65½ [Endorsed:] #18125 Supreme court The Detroit, Fort Wayne & Belle Isle Railway pl'ff in error *vs.* Chase S. Osborn commissioner &c. def't in error Bond. Filed July 10, 1901 Chas. C. Hopkins clerk John C. Donnelly Michael Brennan attorneys for pl'ff in error.

66 Supreme Court of the United States.

THE DETROIT, FORT WAYNE & BELLE ISLE RAILWAY, Plaintiff in Error,
vs.
CHASE S. OSBORN, Commissioner of Railroads, Defendant in Error.

Assignments of Error.

Now comes said plaintiff in error, and says that the supreme court of the State of Michigan was in error in its judgment in said cause, as follows, to wit:

1. Said court erred in refusing to grant and cause to be issued a writ of mandamus prayed for from the petition of the plaintiff in error, and requiring the said respondent to modify his order as set forth in said petition.

2. Said supreme court of the State of Michigan erred in holding and deciding that the provisions of act number 171 of the Public Acts of 1893 of the State of Michigan, entitled "An act to regulate the construction of tracks of railroads and street railroads across each other, and the stringing of wires, electric or other over railroad tracks, and relative to the maintenance of such tracks heretofore constructed, and wires heretofore so strung," were valid in so far as they authorize the defendant in error, The Commissioner of Railroads to make the order complained of in this case, requiring the plaintiff in error to bear a certain proportion of the cost of installing and maintaining safety devices at the crossing on Clark avenue mentioned in the petition, as valid and constitutional.

67 3. Said supreme court of the State of Michigan erred in holding and deciding that the action of the commissioner under said statute was valid; that said act was constitutional and valid, and that the action of said defendant thereunder was not in violation of the constitutional rights of the plaintiff in error, and that said plaintiff in error was not thereby deprived of its property, franchises and rights without compensation, and without due process of law, in controvention of section 10, article 1 of the Constitution of the United States.

4. The said supreme court of the State of Michigan erred in holding and deciding that the provision of said act number 171, above

entitled, and the order of the said defendant as commissioner of railroads of the State of Michigan do not operate as a denial to said plaintiff in error of the equal protection of the laws in contravention of section 1, of the fourteenth amendment to the Constitution of the United States.

5. The said supreme court of the State of Michigan erred in holding and deciding that the said plaintiff in error was not entitled to have issued and enforced, a writ of mandamus against the defendant, as prayed for in his said petition.

6. The said supreme court of Michigan erred in holding and deciding that the occupation and use of the highway by the Detroit, Fort Wayne & Belle Isle railway for street railway purposes was of such a character that the legislature of the State of Michigan could authorize the defendant to single it out from all other occupants and users of the highway, and impose upon it the expense and burden of erecting and maintaining safety devices, as attempted in his said order; such holding and decision being in effect denying to the said Detroit, Fort Wayne & Belle Isle railway the equal protection of the laws, and an impairment of the obligation of its contract for the use of said highway, inasmuch as it violated the well-settled rule of law that the use made by said Detroit, Fort Wayne & Belle Isle railway of the highway was not an additional burden on the easement, but was in furtherance of the purposes for which the street was established and maintained.

Therefore the said plaintiff in error prays that the judgment of the supreme court of the State of Michigan may be reversed, and that said court be directed to issue a writ of mandamus prayed for by the said plaintiff in error.

JOHN C. DONNELLY &
MICHAEL BRENNAN,
Attorneys for Plaintiff in Error.

July 10, 1901.

67½ [Endorsed:] Supreme Court of the United States. Detroit Fort Wayne & Belle Isle R'y pl'ff in error *vs.* Chase S. Osborn def't in error Assignments of error John C. Donnelly Michael Brennan att'ys for pl'ff in error 65 Moffat bldg., Detroit, Mich.

68 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Michigan, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between The Detroit, Fort Wayne & Belle Isle Railway, relator, and Chase S. Osborn, commissioner of railroads, respondent, wherein was drawn in question the validity of a treaty or statute of or an

authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of the statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute or, or commission held under, the United States, and the decision was granted against the title, right, privilege, or exemption specially set up or planned under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened to the great damage of the said relator as by its complaint appears, we being willing, that error if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, the tenth day of July, in the year of our Lord one thousand nine hundred and one.

[Seal of the Circuit Court, Eastern District of Michigan.]

WALTER S. HARSHA,
Clerk of the U. S. *Circuit Court of the United States for the Eastern District of Michigan.*

Allowed by
R. M. MONTGOMERY,
Chief Justice Supreme Court of Michigan.

[Endorsed:] Supreme Court of the United States The Detroit Fort Wayne & Belle Isle Railway plaintiff in error *vs.* Chase S. Osborn commissioner &c. defendant in error Writ of error. Filed July 10, 1901 Chas. C. Hopkins clerk sup. ct. of Mich. John C. Donnelly & Michael Brennan attorneys for pl'ff in error.

The execution of the within writ appears by transcript of record hereto annexed.

Dated July 17, 1901

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of Michigan.

69 *Copy of Journal Entries.*

THE DETROIT, FORT WAYNE AND BELLE ISLE RAILway, Relator,
vs.
THE COMMISSIONER OF RAILROADS, Respondent. } No. 18125.

Brennan, Donnelly & Van de Mark, attorneys for relator.
Horace M. Oren, attorney general, attorney for respondent.

Journal.	Date.	Proceedings.
	1900.	
	April 4	Petition filed.
Q. 64.....	April 11	Order allowed, set May 1, 1900.
	May 1	Answer filed.
	May 7	Note of argument filed.
	Aug. 31	Note of argument filed.
	Dec. 11	Application for leave to amend petition filed.
	1901.	
	Jan. 5	Amended petition filed.
	Jan. 9	Stipulation filed.
Q. 325...	Jan. 9	Order entered.
Q. 326...	Jan. 9	Argued and submitted.
	July 2	Denied with costs; opinion filed.
	July 10	Petition for writ of error filed.
	July 10	Writ of error allowed and filed.
	July 10	Bond filed.
	July 17	Return made to writ of error.

70 Supreme Court of the State of Michigan.

THE DETROIT, FORT WAYNE & BELLE ISLE RAILWAY, Relator and Plaintiff in Error,
vs.
CHASE S. OSBORN, Commissioner of Railroads, Respondent and Defendant in Error.

STATE OF MICHIGAN, } ss:
In the Supreme Court, }

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and of all proceedings had and entered in the above-entitled cause by said court, including the written decision and reasons therefor, signed by the judges of said

court, and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original, and it is a true transcript therefrom and of the whole thereof; that attached thereto are the petition for allowance of writ of error, order allowing the writ, citation with acceptance of service endorsed thereon, a copy of the bond to the adverse party, duly approved, the bond to the clerk of the Supreme Court United States, duly approved, the assignment of errors in the Supreme Court of the United States, and the writ of error with allowance endorsed thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Lansing, this seventeenth day of July in the year of our Lord one thousand nine hundred and one.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Endorsed on cover: File No. 18,232. Michigan supreme court. Term No. 139. The Detroit, Fort Wayne and Belle Isle Railway, plaintiff in error, *vs.* Chase S. Osborn, commissioner of railroads. Filed July 20", 1901.